

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

77-1224

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 77-1224

UNITED STATES OF AMERICA,

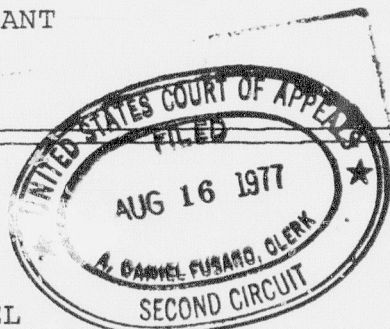
-vs.-

FRANK TILLMAN LEWIS,

Defendant-Appellant.

On Appeal From The United States District Court
For The Eastern District Of New York

BRIEF IN BEHALF OF APPELLANT
FRANK TILLMAN LEWIS



HENRY J. BOITEL
Assigned Counsel for Appellant
Frank Tillman Lewis
233 Broadway
New York, New York 10007
(212) RE 2-8104

TABLE OF CONTENTS

	<u>Page</u>
Table of Authorities	iii-
Preliminary Statement	1
Statement of Facts	3
Brian Walker	4
Tunner Davis	4
Lydia Santiago	4
Norma Sharpe	4
FBI Agent Leo Farrell	5
Vincent Brown	5
Richard Casciano	6
FBI Agents Leo Farrell and Robert Booth	7
Donald Palmer	7
Richard E. Schmidt	8
Argument	9
POINT I - The defendant was deprived of a fair trial and his right to the effective assistance of counsel when the Court denied him a pre- trial continuance for the purpose of preparing his case for trial .	9
POINT II - The issue of the voluntari- ness of admissions made by the defendant was not placed before the jury in compliance with 18 U.S.C. § 3501	13
POINT III - The pre-trial photographic identification of the defendant should not have been received in evidence	18

A. The photographic identification should not have been received in evidence because it was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable mis-identification	19
B. The trial testimony with respect to the pre-trial photographic identification should have been excluded from evidence as being in violation of Rule 801(d)(1)(C) of the Federal Rules of Evidence	21
POINT IV - The Court erred in failing to charge the jury on the issue of identification	25
POINT V - The finding of contempt should be reversed and the charge should be dismissed	27
Conclusion	38

TABLE OF AUTHORITIES

	<u>Page</u>
<u>Cases:</u>	
<u>Gompers v. Buck's Stove & Range Co.,</u> 221 U.S. 418 (1911)	36
<u>Richmond Black Officers v. City of Richmond,</u> Va., 548 F. 2d 123 (4th Cir., 1977) ...	36
<u>Simmons v. United States,</u> 390 U.S. 377 (1968)	19
<u>United States v. Barnette,</u> 546 F. 2d 187 (5th Cir., 1977)	36
<u>United States v. Fernandez,</u> 456 F. 2d 638 (2d Cir., 1972)	26
<u>United States v. Lucchetti,</u> 533 F. 2d 38 (2d Cir., 1976)	16, 17
<u>United States v. Millican,</u> 414 F. 2d 811 (5th Cir., 1969)	12
<u>United States v. Ploeger,</u> 428 F. 2d 1204 (6th Cir., 1970)	12
<u>United States v. Robinson,</u> 544 F. 2d 110 (2d Cir., 1976)	26
<u>United States Code:</u>	
18 U.S.C. § 2	1
18 U.S.C. § 371	1
18 U.S.C. § 401	34
18 U.S.C. § 2113[d]	1
18 U.S.C. § 3501	13, 15-16, 18
18 U.S.C. § 4205(b) (2)	2
<u>Federal Rules of Evidence:</u>	
Rule 801	21, 22, 23, 24
<u>Other Authorities:</u>	
Weinstein's <u>Evidence</u> , Vol IV, § 801(d) (1) (C) [01]	22-3

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 77-1224

UNITED STATES OF AMERICA,

-vs.-

FRANK TILLMAN LEWIS,
Defendant-Appellant.

On Appeal From The United States District Court
For The Eastern District Of New York

BRIEF IN BEHALF OF APPELLANT
FRANK TILLMAN LEWIS

Preliminary Statement

Frank Tillman Lewis appeals from two judgments entered against him in the United States District Court for the Eastern District of New York.

After a jury trial, upon Indictment 77 Cr. 54 (s), before the Honorable Thomas C. Platt, Lewis was found guilty of the robbery of a Federally insured bank, by the use of a dangerous weapon (Count II - 18 U.S.C. §§ 2113[d] & 2), and conspiracy to do so (Count I - 18 U.S.C. § 371).

On April 29, he was sentenced to serve a term of imprisonment of five (5) years as to Count I and twenty-five (25) years as to Count II. The sentence as to Count I was ordered to run consecutive to the sentence on Count II. Both sentences were pursuant to the parole provisions of 18 U.S.C. § 4205(b) (2).

During the subsequent trial of the co-defendant Robinson Quinones, Lewis was called as a defense witness. As a result of the testimony which he gave at the Quinones trial, on May 10, 1977, the District Court (Platt, J.) twice cited Lewis for contempt. On May 11, 1977, the Court adjudged Lewis in contempt, and ordered that he be committed to the custody of the Attorney General or his authorized representative for a term of six months imprisonment. (A. 52*)**

*

Citations preceded by "A. " are to the appellant's appendix filed upon this appeal. The appendix includes the docket entries, the superceding indictment, the Court's charge to the jury, the arrest warrant herein, and various motion papers.

Other citations in this brief are to the transcripts of proceedings in the court below. Those transcripts were not consecutively paginated by the court reporters. For that reason, counsel has taken the liberty of arranging the transcripts in sequential order, separated by index tabs ("B.", "C." etc.). Citations to the transcript are by reference to the index tab, followed by the original page number.

** There were two findings of contempt, and a six month sentence was imposed as to each. During the course of the sentencing proceeding, the Court stated that the two contempt sentences were to be served consecutive to each other, but that in the event that consecutive sentences were improper, then they were to be concurrent with each other. (M. 14-16)

[footnote continued on
following page]

Statement of Facts

Barclay's Bank of New York is located at 2215 Church Avenue, Brooklyn, New York (G. 3). At trial, it was stipulated that on January 3, 1977, the Bank was insured by the Federal Deposit Insurance Corporation (G. 4). At about 9:15 A.M. of that day, two men entered the Bank. One remained by the door, and the other proceeded to the tellers' area and they announced a holdup. The one at the door remained in the general area of the door throughout the incident. It was the government's claim at trial that this man was the defendant Lewis. The other man disarmed a bank guard in the tellers' area (G. 11-16), vaulted himself into the tellers' cage area, and proceeded to collect money from the tellers' drawers (G. 17-24). During the course of the robbery, the man by the door struck and threw to the ground a woman who entered as the robbery was in progress (G. 31). He also fired two shots from a gun, neither of which injured anyone (G. 7, 15, 20, 31, 52-3). The two men then left, carrying an attache case and two plastic bags containing the proceeds of the robbery, which amounted to \$11,822.91. (G. 8, 17-20, 28, 32, 53).

[footnote continued from prior page]

However, the judgment and commitment imposes just one six month sentence. This brief is written upon the assumption that the written judgment is controlling, and that only one six month sentence has been imposed, despite the fact that there were two findings of contempt (A. 52).

The trial witnesses to the robbery were:

Brian Walker, the manager of the Bank, who made no identification of the defendant (G. 3-11);

Tunner Davis, the bank guard, who made no identification of the defendant, but did identify the weapon which had been seized from him which, allegedly, was later found in Lewis's hotel room (G. 11-16);

Lydia Santiago, a bank teller, who made no identification of the defendant, but claimed that a jacket found in the defendant's hotel room was of "the same type" as that worn by the bank robber who stood by the main entrance of the bank (G. 17-24). The jacket in question was marked Government's Exhibit 6 in evidence (G. 22);

Norma Sharpe, a nurses aide who was a customer in the Bank at the time of the robbery. On January 6, 1977 (three days after the robbery), she allegedly selected the defendant Lewis's photograph from a photographic spread which was shown to her by an FBI agent. Based upon that identification, the FBI secured a Federal warrant for the arrest of Lewis. Thereafter, the FBI agents allegedly lost the photographic display, and on January 26, 1977 Mrs. Sharpe was allegedly shown a second, allegedly duplicate, display, from which she again selected Lewis's photograph. The issue of the fairness of the photographic displays was litigated at a pre-trial hearing (E. 25-45). The photographs were marked Government Exhibits 7A-7J, inclusive (E. 31). The defense motion to suppress an in-court

identification by Mrs. Sharpe, as being the result of a suggestive photographic identification, was denied in all respects (E. 46).

At trial, when called upon to identify the man who stood by the door at the Bank, Mrs. Sharpe pointed out a United States marshall, and did not identify the defendant (G. 32; A. 58) . Additionally, while testifying that the robber in question had worn a brown leather coat, she distinguished it from Government Exhibit 6, stating that the robber's coat had been a short coat, whereas it appears that Government Exhibit 6 is a long coat (G. 30-31).

FBI Agent Leo Farrell, who had conducted the photographic displays for Mrs. Sharpe, testified that Mrs. Sharpe had selected the defendant's photograph from those displays on the two occasions we have noted, supra (G. 37-43) .

Vincent Brown was a customer in the Bank during the course of the robbery. At the time of the robbery, he was a former New York City police officer (a victim of the economic crisis), and at the time of the trial he was an employee of the United States Department of Justice (G. 49). He testified that when the robbers left the Bank, he followed them and saw them enter a white Cadillac. He wrote down the license plate number of the vehicle (Government Exhibit 9). At trial, he identified a photograph of the vehicle (Government Exhibit 10). (G. 55). When shown the coat which had been seized from the defendant's hotel

room (Government Exhibit 6), he testified "My recollection, I think it was much brighter colors." (G. 58). He did not identify the defendant.

Richard Casciano is a driver employed by the Parkridge Limousine Service. He testified that on January 3, 1977 (the day of the robbery), he was directed by his firm to pick up a party on Eighth Avenue and Carroll Streets in Brooklyn. When he arrived at that address a "Mr. LaRossa" came to the door, introduced himself, and had him wait until another individual arrived. A few minutes later, the other individual came, and Casciano realized that he had driven this other individual to Philadelphia some six weeks earlier. (G. 62-64). At trial, Casciano identified the defendant Lewis as being this second individual (G. 68). He drove the two men to Bedford Avenue and Martense Street, where they left the car briefly, and he then drove them to a corner on Flatbush Avenue near the Barclay Bank. He double parked; they left the car, and he waited for them to return. A while later, they re-entered the car and had him drive them to where he had originally picked them up. (G. 64-65). Government Exhibit 13 is the paid bill for the limousine trip of that day (G. 71-2) and Government Exhibit 14 shows the license plate number of the vehicle in question (G. 75-6). The authenticity of the records was attested by Sylvia Erato, the secretary of the Parkridge Limousine Service (G. 74-8).

At trial, Casciano could not recall the color of the coat worn by the defendant on the day that Casciano drove the defendant to the area of the Bank (G. 69). However, when Casciano was interviewed on the very night of the bank robbery, he told the FBI agents that the defendant had been wearing a dark blue trenchcoat (G. 93).

FBI Agents Leo Farrell and Robert Booth testified to the circumstances under which Lewis was arrested at the New York Hilton Hotel at about 5:00 A.M. on January 15, 1977 (G. 79-108; 109-124).

The details of the testimony of the agents will be set forth in our argument, infra. Suffice it to say that Agent Farrell testified that two weapons were found when the defendant was arrested in his hotel room. Exhibit 2 is a .38 caliber Smith & Wesson revolver and Exhibit 3 is a .25 caliber Mauzer automatic pistol (G. 82-4). Also found was the brown leather coat, which was marked as Government's Exhibit 6 (G. 86). Agent Booth testified that, about a half hour or more after the arrest, and as the agents were about to bring the defendant Lewis back to the FBI office, Lewis allegedly said, "Yeah, I'm guilty. Money is my bag." (G. 113).

Donald Palmer, a New York City detective, testified that two spent bullets and a cartridge casing were found at the bank robbery scene (Government Exhibits 12A, 12B, and 12C).

Richard E. Schmidt, an FBI ballistics expert, testified that Exhibits 12A and 12B had been fired from Exhibit 3. (G. 131).

* * *

In view of the above, it can be seen that the government's theory was:

(1) a patron of the Bank, Norma Sharpe, had identified the defendant from a photo display a few days after the robbery, although she could not identify him in person at the time of the trial;

2) a gun which the robbers brought into the Bank, and which was twice discharged in the Bank (Exhibit 3) was found in the defendant's hotel room at the time of his arrest. A second gun, which had been seized from the bank guard, and which was identifiable by serial number, was also found in the defendant's room at the time of his arrest;

(3) a long brown leather jacket was found in the defendant's room at the time of his arrest, and one witness (the same one who had made the photographic identification), testified that it was the "same color" as one which had been worn by one of the robbers. However, neither she, nor any of the eyewitnesses, testified that Exhibit 6, in fact, coincided with their recollection of the robber's coat;

(4) the defendant allegedly voluntarily admitted complicity in the crime.

Argument

POINT I

THE DEFENDANT WAS DEPRIVED OF
A FAIR TRIAL AND HIS RIGHT TO
THE EFFECTIVE ASSISTANCE OF
COUNSEL WHEN THE COURT DENIED
HJM A PRE-TRIAL CONTINUANCE FOR
THE PURPOSE OF PREPARING HIS
CASE FOR TRIAL.

The bank robbery was on January 3, 1977. The defendant was arrested on January 15, 1977. He was arraigned upon the original indictment on February 4, 1977, and Judge Platt required that pre-trial motions be served and filed no later than February 14, 1977, returnable February 18, 1977 (B. 4). He was arraigned on the superseding indictment on February 11, 1977 (C. 1, et seq.). Despite the earlier press for the filing and return date of pre-trial motions, it turned out that the prosecutor was on vacation from February 17, 1977 through March 1, 1977. (D. 3; A. 61). The Court honored her request for a continuance of the case to March 2, 1977 (D. 4).

On March 2, 1977, at the request of the defendant, defense counsel (an attorney employed by the Legal Aid Society) requested that the defense be granted a reasonable period of time between the motions scheduled to be heard on that day and the commencement of the trial:

"Mr. Lewis has asked me to address the Court with respect to this case in view of the fact that he is desirous of asking Your Honor for some time to prepare his case after the motion is heard in this

matter stating the reasons that he has not had ample opportunity to discuss a possible defense with me and he is desirous, since he has not been relayed as much information concerning the case as he would like, he feels that after the hearings that are had in this case he can properly advise counsel of a defense. Up to this time, I have not received particulars in this case." (E. 4).

When it became clear that the Court had no intention of granting a pre-trial continuance, the defendant, pro se, addressed the Court as follows:

"I have been coming here for the last month or so and have met with my counsel briefly five minutes or so once I am in this chair over here and I have never heard any defense strategies being formulated in the course of five minutes in a cage.

"I have asked counsel here to meet with me at M.C.C. at a time convenient for him, but due to the fact he has a tight schedule, I have not met with him other than when I am brought in this court in that little cage for five minutes and that seems ridiculous to articulate my argument within three minutes or so. That is why I ask the Court for an extension." (E. 6).

As shown by the record, and as known to the District Court, the defendant's assigned counsel had, on the prior day, just terminated a trial before Judge Neaher in the same courthouse (D. 46-7). Nevertheless, Judge Platt denied the defendant's plea upon the following grounds: (1) the defendant could discuss his case with his lawyer during the course of the trial; (2) the Judge was required to give the defendant a speedy trial because

the defendant was in jail; and (3) the Judge could not afford the "luxury" of giving the defendant the additional time:

"We will proceed and we will determine as we are going along whether it is necessary. I think Mr. Termini will be able to discuss this case with you during the course of the trial.

"This case has been on for one month now. I am mandated to give you a speedy trial because you are a jail case. I have set this date and moved other cases around to accommodate this case. I don't have the luxury of giving people a time when they are ready." (E. 6-7).

The defendant, rather eloquently and concisely, responded:

"I am not asking for time. I am asking for justice." (E. 7).

Thus, with only two or three five minute sessions with his attorney, while literally sitting in the prisoners' dock in court, and only a month and a half after his arrest, the defendant was directed to proceed to trial.

The pre-trial hearings (E. 1-48), the openings to the jury (F. 1-8), and a substantial portion of the trial testimony (G. 1-45), all occurred on March 2, 1977. Both sides rested by the end of the morning of March 3, 1977 (G. 132-133), and the Court denied defense motions addressed to the sufficiency of the evidence (G. 132). The case was then adjourned to Monday, March 7, 1977, due to the Court's other calendar obligations and a scheduled trip of the Trial Judge to Suffolk County with respect to apparently judicial

business (G. 133-6). The summations, charge and jury verdict all occurred on March 7, 1977.

The denial of a continuance is an abuse of discretion where the brief preparation time which has been allowed does not measure up to the standards of a proper trial. United States v. Millican, 414 F. 2d 811 (5th Cir., 1969); United States v. Ploeger, 428 F. 2d 1204 (6th Cir., 1970). Notably, both of the aforementioned cases involved bank robberies.

It is respectfully submitted that, upon the facts of this case, the defendant was clearly deprived of his right to due process of law and to the effective assistance of counsel. In any event, the Court's abuse of discretion in denying the defendant a continuance, presents a proper situation for this Court, in the exercise of its supervisory powers, to reverse the judgment of conviction herein.

We earnestly pray that this Court contemplate the significance of a rush to trial such as occurred in this case. Frank Tillman Lewis suffers from the fact that he is, from a public point of view, a nobody who has been accused of bank robbery. If the proceedings in this case had been, in fact, public proceedings followed by the public-at-large, there can be no doubt that the rush in this case would have generated a public furor particularly in view of the defendant's lack of pre-trial opportunity to meaningfully consult with his assigned counsel.

It is respectfully submitted that the denial of a continuance in this case requires a reversal of the judgment of conviction.

In the alternative, we urge that the other errors discussed in this brief be viewed within the context of the defendant's lack of any significant time to consult with counsel and to prepare his case for trial.

POINT II

THE ISSUE OF THE VOLUNTARINESS
OF ADMISSIONS MADE BY THE DEFEN-
DANT WAS NOT PLACED BEFORE THE
JURY IN COMPLIANCE WITH 18 U.S.C.
§ 3501.

Subsequent to the filing of pre-trial motions, defense counsel was advised that the government intended to offer into evidence a statement made by the defendant at the time of his apprehension. (E. 3). The pre-trial hearing, therefore, concerned the propriety of: (1) the circumstances under which the statement was obtained from the defendant; (2) the seizures from the defendant's room; and (3) the pre-trial photographic identification. (E. 7).

At the pre-trial hearing, FBI agents testified that, at about 5:10 A.M., FBI agents and New York City detectives secured the area surrounding the defendant's hotel room. They were equipped with body armor, shotguns, handguns and walkie-talkies (E. 12). A telephone call was placed to the defendant's room, and he was advised to come out with his hands up. When he did so, he was handcuffed and

he was allegedly advised of his rights (E. 14, 17, 20-21, 33-4). FBI Agent Samuel M. Wichner testified:

"I remember at one point Mr. Lewis, as he was being handcuffed and placed against the wall, saying I am guilty; the money is in my bag or some words to that effect." (E. 17).

FBI Agent Farrell placed a similar admission as having occurred somewhat later in the arrest process, and quoted the defendant as stating: "Yes, I am guilty; the money is by my bag."

In fact, it does not appear that any bank robbery money was found in the defendant's possession, and none was introduced in evidence at trial.

At the trial, Agent Farrell testified that the arresting force consisted of six FBI agents and five detectives (E. 94). He also revealed that the defendant was stripped of his clothes during the arrest process (E. 100-2). Peculiarly, the trial testimony concerning the defendant's alleged admission came from an FBI agent who had not testified at the hearing. Agent Booth testified as follows:

"Q. After he was given his Constitutional warnings did he make any statements to you?

"A. Yes, sir.

"Q. Could you relate that to the jury, please?

"A. At one point there was a statement -- the course of the interview conducted with Lewis was over the period, approximately, I would say a half hour or possibly longer but in that general area. During the course

of this, when we were getting ready to take Mr. Lewis back to the FBI Office where he was to be processed, fingerprinted, he made the statement 'Yeah, I'm guilty. Money is my bag.'

"Q. He made that statement to you?

"A. Yes, sir -- the statement, sir, was direct [sic] to approximately three or four agents that were talking with him at the time. We had just mostly culminated our interview and this was a statement that he made. * * *"
(G. 112-113).

Although the defendant was wearing clothes when the agents first entered the hotel room, by the time he made the alleged statement to the FBI agents, it appears that he had "no clothes on" and was handcuffed (G. 120-121).

In his summation, the prosecutor emphasized the defendant's alleged admission (H. 4). Defense counsel's argument in summation concerning the alleged admission was as follows:

"Now, Agent Farrell does not testify as to any statements. Apparently he knows nothing about it, nothing; no statements at all. It's Agent Booth who says there are statements. Agent Farrell absolute silence. Agent Booth says Mr. Lewis made a statement that Mr. Berne has referred to. Use your own intelligence. I don't have to bat down this kind of thinking." (H. 27).

18 U.S.C. § 3501(a), which relates to the admissibility of confessions in Federal criminal trials, provides as follows:

"(a) In any criminal prosecution brought by the United States or by the District of Columbia, a confession, as defined in section (e) hereof shall be admissible in evidence if it is voluntarily

given. Before such confession is received in evidence, the trial judge shall, out of the presence of the jury, determine any issue as to voluntariness. If the trial judge determines that the confession was voluntarily made it shall be admitted in evidence and the trial judge shall permit the jury to hear relevant evidence on the issue of voluntariness and shall instruct the jury to give such weight to the confession as the jury feels it deserves under all the circumstances." [Emphasis added].

No such instruction was given to the jury in the present case.

In United States v. Lucchetti, 533 F. 2d 28 (2d Cir., 1976), which was also a bank robbery case, this Court made clear that the failure to give the jury an instruction, pursuant to § 3501(a), is error:

"In the present case, the government offered evidence showing that the confession was voluntary. Lucchetti did not testify or offer evidence to the contrary. Included in that portion of the grand jury testimony read to the jury were the assistant United States attorney's questioning of Lucchetti with respect to his comprehension of his constitutional rights and Lucchetti's positive assertion that he was testifying before that body voluntarily. In addition, Agent Long testified extensively about informing Lucchetti of his rights and about Lucchetti's having signed the advice of rights form. Certainly, this testimony was elicited by the government to show that all of Lucchetti's self-incriminating statements had been freely and voluntarily given.

"Because Lucchetti had raised the issue by a motion to suppress before trial and because there was evidence admitted at the trial which related to the voluntariness of the confessions, 18 U.S.C. § 3501(a) was applicable by its terms in the instant case. As this Court stated in

[United States v.] Barry, [518 F. 2d 342 (2d Cir., 1975)], '[i]t would be difficult to imagine a clearer imperative than the statutory direction that the judge "shall instruct the jury".' Id. at 346 (emphasis in original). Consequently it was incumbent upon the trial judge to include in his charge instructions with respect to the voluntariness of a confession and that 'the jury give such weight to the confession as the jury feels it deserves under all the circumstances.' The Court's failure to do so in this case was erroneous.

"As the government has pointed out, however, Lucchetti offered no evidence at trial from which the jury could have inferred that the confessions were anything but voluntary. Conspicuously absent from the evidence at trial were any of the contentions raised by Lucchetti at the suppression hearing and discussed in Part I of this opinion. Even though the trial court failed to apply the statute, the appellant here certainly suffered '[in]sufficient prejudice,' if any, 'to justify vitiating the jury's verdict.' [Citations omitted]. The district court's error was indeed harmless." (533 F. 2d at 39-40).

As shown by this Court's holding in Lucchetti, the failure of the trial judge to charge the jury, with respect to the weight to be given the alleged confession, constituted plain error. However, unlike the situation in Lucchetti, the facts in this case demonstrate that the error was prejudicial to the defendant. Unlike Lucchetti, there was no stenographic record of the circumstances under which the defendant in this case made the alleged admission, there was no advice of rights form signed, the defendant was not before a grand jury. To the contrary, the defendant was naked on a bed and handcuffed at 5:00 o'clock in the

morning, with more than ten law enforcement officers in the room, armed to the teeth.

It is respectfully urged that the failure of the trial court to charge in conformity with 18 U.S.C. § 3501(a), constituted reversible error.

POINT III

THE PRE-TRIAL PHOTOGRAPHIC IDENTIFICATION
OF THE DEFENDANT SHOULD NOT HAVE BEEN
RECEIVED IN EVIDENCE.

Of all of the eyewitnesses in the Bank, only Norma Sharpe was relied upon by the government as being able to identify the defendant. In fact, at trial, when called upon to do so, Mrs. Sharpe pointed out someone other than the defendant - a United States marshall (G. 32-3). Following that testimony, the prosecutor, over objection, presented a photographic display of ten photographs (Government Exhibit 7) to her. She identified them as being the same photographs as had been shown to her at a session with FBI agents about a month prior to trial (G. 33-4). Each of the photographs, with the exception of two, had Mrs. Sharpe's initials on the reverse side. The seventh had her signature on the reverse side, and the eighth had nothing on the reverse side (G. 35-6; see also: Exhibit 7, generally). The prosecutor then questioned her, in the presence of the jury, as follows:

"Q. * * * At that time you testified, you said previously that you were able to pick out the man who you believed

was the leader?

"A. This one (indicating).

"Q. This man right here, number 7?

"THE COURT: IS that right, Mrs. Sharpe?

"THE WITNESS: Yes."

Since it was only the defendant's picture that had Mrs. Sharpe's full signature on its reverse side, and since Mrs. Sharpe had twice been through the same procedure with FBI agents, it would be absurd to conclude that the in-court procedure truly represented any sort of a fair identification process.

Following Mrs. Sharpe's testimony, the government called Agent Farrell, who testified with respect to Mrs. Sharpe's alleged selection of the defendant's photograph from the same or similar photographic spreads, first on January 6, 1977 and then on January 25, 1977 (G. 37-43).

A. The Photographic Identification Should Not Have Been Received in Evidence Because it was So Impermissibly Suggestive as to Give Rise to a Very Substantial Likelihood of Irreparable Misidentification.

In Simmons v. United States, 390 U.S. 377 (1968), the Court made clear that:

"[C]onvictions based on eyewitness identification at trial following a pre-trial identification by photograph will be set aside on that ground only if the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of

irreparable misidentification."
(390 U.S. at 384).

It is respectfully submitted that the circumstances of the present case demonstrate that the photographic identification by Mrs. Sharpe was impermissibly suggestive. We urge this Court to examine the photographic display (Government Exhibit 7). Such an examination will show that, aside from the other individuals being black, there was no significant resemblance between them and the defendant. Moreover, only the defendant's photograph was plainly a lineup photo, as shown by the yardstick type of measuring device which appeared on the right hand side of the photograph.

We are not dealing here with a situation where the bank robber in question presented a clear view to the eyewitnesses in the Bank. Of all the eyewitnesses, only Mrs. Sharpe claimed the ability to identify the individual in question. Similarly, we are not dealing here with an in-court corporeal identification which provided the Court and jury with some intangible, but convincing demonstration of Mrs. Sharpe's ability to identify the defendant. When called upon to do so, she picked out the wrong man.

In view of the above, the totality of circumstances calls for the conclusion that Mrs. Sharpe's alleged photographic identification of the defendant was so unreliable as to require an exclusion of identification testimony at the trial.

B. The Trial Testimony With Respect to the Pre-Trial Photographic Identification Should Have Been Excluded From Evidence as Being in Violation of Rule 801(d)(1)(C) of the Federal Rules of Evidence.

Rule 801(d) of the Federal Rules of Evidence provides:

"(d) Statements which are not hearsay. - A statement is not hearsay if -

(1) Prior statement by witness. - The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (A) inconsistent with his testimony, and was given under oath subject to the penalty of perjury at a trial, hearing or other proceeding or in a deposition, or (B) consistent with his testimony and is offered to rebut an express or implied charge against him of recent fabrication or improper influence or motive, or (C) one of identification of a person made after perceiving him;"

Officer Farrell's trial testimony concerning the prior photographic identification clearly does not fall within subsection (A) of the above noted provision. Mrs. Sharpe's photographic identification was not made within the context of a prior proceeding and was not made under oath subject to the penalty of perjury.

Similarly, Officer Farrell's testimony does not fall within subsection (B) since the jury had not been exposed to any claim by the defense that Mrs. Sharpe's testimony had been a recent fabrication or had been given under improper influence or motive.

This case presents a number of issues, which

appear to be of first impression, with respect to the construction of subsection (C). In Weinstein's Evidence, Volume IV, § 801(d)(1)(C)[01](at pp. 102-110), Judge Weinstein discusses this provision of Rule 801. Thus, at p. 107, the question is posed:

"* * * For example, does the Rule authorize the admission of testimony that the witness identified a photograph of the defendant or does the language of the Rule, 'identification of a person' restrict its operation to corporeal rather than photographic identification."

Without citation of any authority that authoritatively construes the Rule, Judge Weinstein has concluded that the Rule should "be interpreted as allowing evidence of prior identification by the witness of a photograph of the person whom he had initially perceived."

Judge Weinstein then proceeds to a second issue that is also presented by this case:

"More troublesome is the question whether Rule 801(d)(1)(C) would operate to allow only the testimony of the identifying witness himself or whether persons present at the out of court identification or informed of it by the witness might testify to the fact of the identification. If the purpose of the testimony is merely to bolster the eyewitness's credibility, no hearsay problem is presented. The statement of the observer or recipient of the fact of identification is being offered not to show the truth of the statement but to show that a statement of identification was made.* * * If, however, at the time of trial the eyewitness does not remember or denies that he made the identification, may the previous statement of the eyewitness be proved by the observers or persons in whom he confided, and may that statement be given

substantive effect?

"It seems clear from the Congressional debate and examples given on the floor of the House set out in 1975 Amendments, supra, that at least some Congressmen believed that an absence of memory or even a denial by the identifying declarant would not bar testimony by a witness to the identification. But the language of the Rule and Constitutional problems need to be considered." (Id., at p. 108).

Judge Weinstein makes clear that the resolution of the question involves a careful balancing process:

"In order to resolve the question of whether non-identifying witnesses should be permitted to testify to the identification, the court will have to consider the reliability of the circumstances surrounding the prior identification, the use to which the testimony is being put, its significance to the case which determines its probative value, the scope of the eyewitness's direct examination, and his testimony on cross-examination. These are all factors which the judge must weigh to determine whether the proffered testimony meets confrontation standards and whether its admission would unduly prejudice the defendant." (Id., at p. 109).*

In view of the lack of any controlling authority on the subject, we respectfully rely upon the text of the Rule, itself, and we urge this Court that Officer Farrell's testimony should not have been received in evidence for the following reasons:

(1) Rule 801(d)(1)(C) should be interpreted as

* See also the bank robbery identification hypothetical set forth by Judge Weinstein at p. 110.

requiring a prior corporeal identification, and the requirements of the Rule are not satisfied by a prior photographic identification;

(2) Particularly since there was no in-court identification, it was improper to permit the police officer to testify as to the facts and circumstances of the prior photographic identification;

(3) Since Mrs. Sharpe's in-court testimony clearly, but erroneously, identified someone else as the bank robber in question, the restrictions of Rule 801 (d) (1) (A) supercede subdivision (C). This was clearly an effort by the government to present a prior inconsistent statement of the witness, but since the prior statement was not made under oath in a proceeding of the type described under subdivision (A), it should have been excluded for that reason.*

* Defense counsel did not specifically object to Agent Farrell's testimony. However, during the course of Mrs. Sharpe's testimony, there was an objection to the government going into the photographic procedure. In any event, the admission of the testimony should be construed as plain error, particularly in view of the issue set forth in Point I of this brief.

POINT IV

THE COURT ERRED IN FAILING TO CHARGE
THE JURY ON THE ISSUE OF IDENTIFICATION.

At the conclusion of the evidence, the following colloquy occurred between the Court and counsel:

"[Defense counsel]: Is there a law secretary I can inquire as to the way Your Honor's going to charge on photographic identification?

"THE COURT: On what my standard charge is?

"[Defense counsel]: Yes. I am unfamiliar.

"THE COURT: I have no particular charge with respect to identification.

"I have given one or two in the past, but if you wish, if both of you wish to submit one, I will be glad to consider it.

"[Defense counsel]: But Your Honor does intend to charge in that area.

"THE COURT: If you request it certainly I will of course say something about the defendant's contentions that there has been a misidentification here, because you're entitled to that anyway. But, whether if you want some special charge with respect to identification and mis-reliability, so forth, I'll consider it. I won't say I will give it. It depends on how it's phrased.

"[Defense counsel]: Everything's relative.

"THE COURT: Then if the government wants to submit something I will be glad to submit that." (G. 139).

The closest that the Court came to giving the jury a charge with respect to the identification evidence

was as follows:

"Now, defendant claims the government has failed to prove beyond a reasonable doubt that he was one of the perpetrators of the crime. The evidence in this case raises the question of whether or not the defendant was in fact the criminal actor or was the criminal actor; unless it necessitates your resolving any conflict or testimony on that issue the burden of proof is on the prosecution with reference to every element of the crime charged, and this burden includes beyond a reasonable doubt, the identity of the defendant as one of the perpetrators of the crime charged." (A. 39).

Although there was no other colloquy, request to charge or exceptions to the charge, we respectfully submit that the failure of the trial judge to charge as to the dangers of misidentification constituted plain error within the context of this case. See: United States v. Fernandez, 456 F. 2d 638, 642-644 (2d Cir., 1972); United States v. Robinson, 544 F. 2d 110, 112, fn. 2 (2d Cir., 1976).*

* Both of the cited cases were bank robbery cases in which there were pre-trial photographic identifications. Neither case appears to have involved the extent of unreliability which has been demonstrated in the present case.

POINT V

THE FINDING OF CONTEMPT SHOULD
BE REVERSED AND THE CHARGE
SHOULD BE DISMISSED.

The trial of the co-defendant Quinones occurred about two months after the trial of the defendant Lewis. Quinones called Lewis as a defense witness. Anticipating a problem with respect to Lewis's testimony, the Court directed that Lewis first testify in the absence of the jury.*

The Court first advised Lewis that, since he had outstanding New York State charges against him and since his own conviction was on appeal, he still retained his Fifth Amendment privilege and was not required to testify. The Court cautioned, however, "Once you start to testify, however, you may well be required to testify fully. In other words, you just can't be selective to the answers to which you give." (I. 277).

When Lewis indicated that he did not have a desire to waive his Fifth Amendment rights, the Court sent Lewis and his attorney out of the courtroom to discuss the matter. In their absence, the Court noted as follows:

"I am frank to say that I haven't
had an opportunity or adequate opportunity

* Both the offer of proof and Lewis's eventual trial testimony are consecutively paginated under tab "L" of the bound transcript.

to research the law on this subject, but in my conversations with the other judges today at lunch, they were pretty much in agreement that the rule is if he is only going to testify to a portion of what he thinks might be favorable to one side and refuse to answer any other questions on cross-examination, invoking his Fifth Amendment, in other words, just not testifying fully once he opens the door, that I am empowered to exclude the testimony. I think that is the law I am going to follow." (L. 278-9).

Thereafter, Lewis returned to the courtroom, and the "trial run" of his testimony commenced in the absence of the jury (L. 279).

Lewis admitted to taking a limousine to the area of the Barclay Bank on the day in question, and stated that an individual by the name of "Jose" accompanied him. (L. 279-281). He admitted to knowing the co-defendant Quinones, and to having used Mr. Quinones in the capacity of an aid or servant for several months, as Lewis pursued his normal occupation of gambling. (L. 282-284). He testified that he had never seen Quinones in possession of a gun (L. 286), and that he did not tell Quinones where he (Lewis) was going on the critical morning. (L. 282). Finally, he was asked:

"Q. To your knowledge, did Mr. Quinones rob the Barclay Bank on January 3, 1977?

"A. To my knowledge, no."

While still within the context of the offer of proof, the prosecutor then cross-examined Lewis (L. 238, et seq.). When the prosecutor sought to probe whether

Quinones was with Lewis on the morning of the robbery, Lewis responded:

"Your answer, I knew all along that Mr. Quinones was not in a white limousine. That is my answer." (L. 293).

* * *

"It's a matter of my conscience. As you know I have thirty years for this particular charge. I just refuse to let this man be victimized by any kind of sentence for something I am quite sure he did not do." (L. 294).

* * *

"From my understanding, I haven't been talking to his counsel too much, from my understanding, it is definite if he is not cleared here, if the Court still insists his trial must continue, it's obvious that I think it is time for me to step forward and admit this man was not in the white cadillac limousine." (L. 296).

The prosecutor then sought to have Lewis admit his own complicity in the robbery. Lewis would only admit being in the white limousine on Flatbush Avenue and would only admit that he had been found guilty of the bank robbery in question (L. 297). Illustrative of several answers that he gave along this line, are the following:

"Q. Did you and Jose go into the Barclay Bank?

"A. Me and Jose was in a white cadillac limousine.

"Q. Yes or no, did you go into the Barclay Bank?

"A. According to the records, according to the records and my previous

trial, it states that myself and another individual went and robbed Barclay Savings Bank according to the records.

"Isn't that enough proof for you? Isn't the Eastern District Court enough proof for you?" (L. 298).

* * *

"According to the records, the record states and the jury have returned a verdict of guilty which clearly indicates, you know, they have reached beyond a reasonable doubt that myself and another individual was in the Barclay Savings Bank." (L. 299)

See also: L. 300.

Following the aforesaid offer of proof, the prosecutor moved that Lewis not be permitted to testify in the presence of the jury, upon the ground that Lewis's refusal to directly respond to questions concerning his own alleged complicity in the bank robbery deprived the government of an opportunity to effectively cross-examine him. (L. 304). The Court acknowledged the problem and even indicated that there was not "a shadow of doubt" in the Court's mind that Lewis would end up taking the Fifth Amendment on that question (L. 307).

Lewis was called back into the courtroom, and the Court directed him to respond to the question of whether he committed the robbery of the Barclay's Bank on January 3 (L. 308). Counsel for Mr. Lewis made clear to the Court that Lewis had no intention of directly answering that question:

"Mr. Lewis and I conferred and agree he's not going to give a yes or no direct answer to that question or

any other question to telling a specific reference of what happened inside the Barclay Bank. If permitted to testify he will refer to what happened in the jury verdict was an established fact by the prosecution [sic] and can be taken as such to them, but he will give yes or no answers." (L. 309)

Lewis was then escorted from the room and, for the first time, in his absence, the Court stated to those who remained in the courtroom as follows:

"He might as well fully understand that I intend to so direct him. I intend to hold him in contempt in front of the jury and I intend -- I do --

* * *

"The contempt is going to be committed not only in my presence, but in the presence of this jury. It's going to be contempt of the jury as well as this Court. They are entitled to see that he is going to be held in contempt. I will not sentence him for the contempt in front of the jury, but I will hold him in contempt each time he refuses to answer." (L. 310-311).

The jury then returned to the courtroom, and Mr. Lewis resumed the witness stand. His testimony was substantially the same as that which had occurred during the offer of proof. Then, during the course of cross-examination, the following occurred:

"Q. Mr. Lewis, it is quite clear what twelve people thought, but the question is according to your version of the facts did you or didn't you go into Barclay's Bank on the morning of January 3rd?

"A. Again I say according to a court of law it found me guilty indicating that I did go to Barclay's Bank.

"[Prosecutor]: Will Your Honor instruct

the witness to answer the question
yes or no?

"THE COURT: Answer the question,
Mr. Lewis.

"THE WITNESS: I am answering.

"THE COURT: Answer the question
yes or no, did you or did you not go
into Barclay's Bank on the morning of
January 3rd?

"THE WITNESS: Once again I will
state --

"THE COURT: Mr. Lewis, I warn you
now unless you give a yes or no answer
to that question the Court is going to
hold you in contempt.

"THE WITNESS: I'm trying to.

"THE COURT: Answer the question
yes or no.

"THE WITNESS: Once again I say the
records found me guilty of returning from
the car from the Barclay Savings Bank.

"THE WITNESS*: All Right.

"The Court holds this witness in
contempt of court for refusing to answer
the question." (L. 352-3).

Later in the cross-examination, the prosecutor
questioned Lewis as follows:

"Q. Isn't it a fact that you went
to Florida on January 4th in order to escape
detection by the FBI after the bank robbery
on January 3rd?

"A. That is not a fact.

"Q. Did Jose go into the bank with

* Probably should read "THE COURT".

you?

"A. According to my previous trial, which indicates that myself and another individual robbed the Barclay's Bank, according to the decision of the jury and so forth.

"[The Prosecutor]: Your Honor, I ask that the witness be directed to --

"THE COURT: Did Jose go into the bank with you, yes or no?

"THE WITNESS: Again, according to the record, according to the trial --

"THE COURT: You understand I am going to hold you in contempt unless you answer that question yes or no?

"THE WITNESS. I understand fully.

"THE COURT: I hold you in contempt a second time." (L. 361).

A. Lewis did not Waive his Privilege Against Self-Incrimination and was not Properly Held in Contempt for Refusing to Incriminate Himself.

From the aforesaid analysis of the proceedings at Quinones' trial, several facts are clear:

(1) the trial judge ruled, and it is the law of this case, that Lewis was protected by his right against self-incrimination and was not obliged to give testimony implicating himself in the bank robbery;

(2) Lewis made clear that, if called to testify, he would refuse to incriminate himself;

(3) Notwithstanding Lewis's refusal to waive his privilege against self-incrimination, the Court nevertheless permitted Lewis to be called and sworn as a trial

witness;

(4) Lewis's testimony made clear that Quinones was not with Lewis in the area of the Bank on the date of the robbery;

(5) The citations for contempt, and the later adjudication of contempt (M. 1-16), were solely based upon Lewis's refusal to incriminate himself;

(6) The Court was fully aware of the fact that, based upon Lewis's responses during the offer of proof, Lewis could have been prevented from testifying at the trial;

(7) The critical conversations concerning what would occur if Lewis persisted in continuing his refusal to incriminate himself, all occurred in Lewis's absence.

The adjudication of contempt was predicated upon 18 U.S.C. § 401, which provides as follows:

"A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as -

(1) misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;

(2) misbehavior of any of its officers in their official transactions;

(3) disobedience or resistance to its lawful writ, process, order, rule, decree, or command."

On the day following the testimony, the Court adjudicated the defendant in contempt, as follows:

"Well, the Court finds that

the defendant, Mr. Lewis, in the capacity as a witness called by the defendant Quinones yesterday, in two instances in which the Court was required to rule, did not obey the direct orders of the Court to answer questions put to him.

"The Court further finds that the defendant was fully cognizant of his ability to invoke his Fifth Amendment privilege, having prior to the direction given by the Court, having invoked such Fifth Amendment privilege at least once with respect to another question posed by the prosecutor. [*].

"Had the defendant -- had Mr. Lewis invoked his Fifth Amendment rights with respect to the questions which -- as to which the Court was called upon to rule, the Court would have observed those Fifth Amendment rights and not directed the defendant to answer the questions. Even though the Court believes that by taking the stand and answering part of the questions with respect to the event of January 3rd, the Court believes the defendant Lewis had waived --

* It would appear that the incident to which the Court makes reference occurred at L. 337:

"Mr. Lewis, Mr. Lewis, did you participate in an attempted murder of a grand jury witness in the New York State case?

"[Defense counsel]: Object to that, too.

"THE COURT: Overruled.

"A. I take the Fifth on grounds it might incriminate me.

"Q. Do you know whether or not Mr. Quinones is involved in that as well?

"[Defense counsel]: Objection, Your Honor, and I ask for a sidebar, Your Honor.

"THE COURT: The objection is sustained."
(L. 337).

or the witness Lewis had waived the Fifth Amendment rights, and no longer had the Fifth Amendment rights in the premises. Had he invoked the Fifth Amendment, the Court, although it believed he had waived his Fifth Amendment rights, would have respected his Fifth Amendment rights.

"However, the Court feels that what was attempted on the Court and on the prosecution's case was a ploy, if you will, a deliberate attempt, as I believe the prosecutor put it in summation, have your cake and eat it too, and answered a part of the questions posed to him and not answered the balance by the guise of saying, 'Look at the record.'" (M. 14).

The Court went on to sentence Lewis for contempt (M. 14-16).

A defendant charged with criminal contempt is presumed to be innocent. He must be found guilty beyond a reasonable doubt. Gompers v. Bucks Stove & Range Co., 221 U.S. 418, 444 (1911). See also: United States v. Barnette, 546 F. 2d 187 (5th Cir., 1977). The basic principles of liability are concisely set forth in Richmond Black Officers v. City of Richmond, Virginia, 548 F. 2d 123 (4th Cir., 1977):

"To support a conviction of criminal contempt for violation of a court order, it must be proved beyond a reasonable doubt, Michaelson v. United States, 266 U.S. 42, 66 (1924), Schwartz v. United States, 217 F. 866, 870 (4th Cir., 1914), that a person wilfully, Panico v. United States, 375 U.S. 29 (1963), contumaciously, In Re Floersheim, 316 F. 2d 423 (9th Cir., 1963), intentionally, In Re Brown, 454 F. 2d 999 (D.C.Cir., 1971), with wrongful state of mind, In Re Farquhar, 492 F. 2d 561 (D.C.Cir., 1973), violated a decree which was definite, clear,

specific, and left no doubt or uncertainty in the minds of those to whom it was addressed. Longshoreman's Association v. Marine Trade Association, 389 U.S. 64 (1967); In Re Brown, supra." (548 F. 2d 123, 129).

It is respectfully submitted that the proceedings in the present case utterly failed to fulfill the aforementioned standards. With respect to his own complicity, Lewis clearly was standing upon his right not to incriminate himself. Prior to his giving any testimony in the presence of the trial jury, the Court knew full well what Lewis intended to do if called upon to incriminate himself. Neither the Court, nor the prosecution, was mislead into believing otherwise. The concluding two paragraphs of the Court's contempt finding are, therefore, incomprehensible:

"Having taken the stand and not having invoked his Fifth Amendment rights with respect to two particular questions, and having attempted to deploy, as he attempted in the two instances, the Court feels its authority has been flouted and the flouting was deliberate, the flouting was part of a plan to disrupt the court proceedings and to disrupt the prosecution's case.

"The Court feels it was wilful and deliberate and a deliberate attempt to perpetrate a fraud on the Court and on the jury."

It is respectfully submitted that since the Court's findings are not supported, beyond a reasonable doubt, by the facts, the adjudication of contempt should be vacated, and the contempt charge should be dismissed.

Conclusion

For all of the above reasons, the judgment of conviction, as to the bank robbery charges, should be reversed and a new trial should be ordered. Additionally, the adjudication of contempt should be vacated and that proceeding should be dismissed.

Respectfully submitted,

HENRY J. BOITEL
Assigned Counsel for Appellant
Frank Tillman Lewis

New York, New York
August, 1977

RECEIVED
U. S. ATTORNEY

AUG 16 4 48 PM '77

EAST. DIST. N. Y.

RECEIVED
U. S. ATTORNEY

AUG 16 4 48 PM '77

EAST. DIST. N. Y.

[Handwritten signature]